IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff v. LFP PUBLISHING GROUP, LLC., d/b/a Hustler Magazine, MARK SAMANSKY, an individual, and other distributors and sellers of Hustler Magazine, as Defendants X, Y, and Z, Defendants.	))))))))))))))))	Civil Action File No. 1:08-CV-0421-TWT

PLAINTIFF'S RESPONSE TO
DEFENDANT LFP PUBLISHING GROUP, LLC'S MOTION TO DISMISS

Comes now, Plaintiff, Maureen Toffoloni, as Administrator and Personal Representative of the Estate of Nancy Benoit, by and through her undersigned counsel, and hereby responds to Defendant, LFP Publishing Group, LLC's Motion to Dismiss as follows.

Toffoloni v. LFP Publishing Group, LLC Doc. 11

I. Issue

The issue before the Court is whether Defendant has satisfied its burden of showing, on the face of the pleadings, that Plaintiff is not entitled to any relief. For

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the reasons set forth below, the facts alleged in this verified complaint are sufficient to afford Plaintiff the relief requested. Accordingly, Defendant's Motion to Dismiss should be DENIED.

II. Statement of Facts

Plaintiff's Verified Complaint sets forth two claims for relief.[1] First, Plaintiff requests this Court issue a Permanent Injunction preventing Hustler Magazine from publishing or continuing to publish any and all nude or partially nude photographs of decedent, Nancy Benoit (Complaint, Count 2). Second, Plaintiff seeks actual and punitive damages arising from Defendants' violation of Nancy Benoit's right of publicity. (Complaint, Count 3). Additionally, Plaintiff requests attorney fees and expenses of litigation pursuant to O.C.G.A. §13-6-11. *Id*.

The allegations to support Plaintiff's request for relief are summarized as follows. The Defendants, acting as Hustler Magazine,[2] published and sold, nude and partially nude photographs of decedent, Nancy Benoit, in the March 2008 issue of Hustler Magazine. (Complaint, ¶ 8). The photographs Hustler published of Ms.

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[1] After a hearing, the Court denied the request for relief as to Count 1 of Plaintiff's Complaint. Accordingly, only Count 2 and Count 3 are at issue.

[2] Hustler Magazine is a pornographic magazine, published frequently, upon information and belief, on a monthly basis. The majority of the content of each monthly magazine is graphic and sexual photographs of nude women. *See Plaintiff's Verified Complaint, #7.*

Benoit were created from a videotape made approximately 20 years ago by Defendant Mark Samansky (Complaint, ¶ 9). At the time the videotape was made, Ms. Benoit and her then husband James Daus were aware that she was being videotaped (Complaint, ¶ 11). However, Ms. Benoit did not consent or give permission for Defendant Samansky to use the videotape in any way (Complaint, ¶ 11). There is no evidence before the Court that Nancy Benoit ever executed a release or other document concerning the use of her image.

Immediately thereafter, Ms. Benoit decided she did not want to have nude or partially nude photographs of herself published by Mr. Samansky, or anyone else (Complaint, ¶ 12, ¶ 14). She insisted Defendant Samansky destroy all photographs of her at that time (Complaint, ¶ 13). Defendant Samansky told Ms. Benoit and her husband that he had destroyed all nude or partially nude photographs of Ms. Benoit, as well as the videotape (Complaint, ¶ 13).

Until her murder in June 2007, Ms. Benoit exploited her image for commercial purposes during her career as a model, professional woman wrestler and public figure (Complaint, ¶ 15). Presently, Plaintiff, as Administrator of Ms. Benoit's Estate, has the legal right to control the use of Ms. Benoit's image for commercial and/or financial gain (Complaint, ¶ 15).

The present litigation developed because Defendant Samansky did not destroy the videotape of Ms. Benoit (Complaint, ¶ 16). Instead, Defendant Samansky kept the videotape, created still photographs from the videotape and apparently sold[3] some or all of the photographs and/or still images to Hustler for publication (Complaint, ¶ 16). This was done without the knowledge or consent of Ms. Benoit or her estate (Complaint, ¶ 17).

Plaintiff requested Hustler refrain from publishing the nude and partially nude photographs of Ms. Benoit because publication of the photographs would be a violation of Nancy Benoit's right of publicity (Complaint, ¶ 18). Hustler denied Plaintiff's request (Complaint, ¶ 19). Accordingly, Plaintiff filed a Complaint against Defendant in the Superior Court of Fayette County. Thereafter, Defendant removed the case to this Court on the basis of diversity of citizenship. After a hearing, the Court denied the request for relief as to Count 1 of Plaintiff's Complaint.

On April 8, 2008, Defendant filed a Motion to Dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim. In response, Plaintiff now respectfully requests this Court deny Defendant's motion.

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[3] Plaintiff does not know the amount of money that changed hands between Hustler Magazine and Mark Samansky. Hustler admits Defendant Samansky "conveyed" to it the right to publish the nude and partially nude photographs of Ms. Benoit in its March 2008 issue (Defendant's Brief in Support of Motion to Dismiss, p. 3, ¶ 1.)

III. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) permits a district court to dismiss a complaint if it fails to state a claim upon which relief can be granted. F.R.C.P. 12(b)(6). The question presented to the court on a motion to dismiss is whether it appears *beyond doubt* that the plaintiff cannot prove *any set of facts* consistent with the allegations that will entitle the plaintiff to relief. *Semerenko v. Cendant Corp.*, 223 F.3d 165, 173 (emphasis added).

In evaluating the pleadings, the Court must accept all of the plaintiff's allegations as true and construe them in the light most favorable to plaintiff's case. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987). Additionally, the Court must give the plaintiff the benefit of every inference that reasonably may be drawn. *Tyler v. Cisneros*, 136 F.3d 603, 607 (9th Cir. 1998); *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). Moreover, even if the pleadings suggest that a chance of recovery is remote, the Court must allow the plaintiff to develop their case at this stage of the proceedings. *Semerenko, supra*.

IV. The Right of Publicity

The right of publicity was first recognized in Georgia by the Court of Appeals in *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966) wherein Mrs. Hipsley brought an action to recover damages for the publication of her photograph which violated her right of privacy. Ms. Hipsley alleged defendants obtained a copy of her photograph in some unknown manner and, without her knowledge or consent, published it in an advertisement carried in "Gay Atlanta" wherein the public was invited to Atlanta's Playboy Club.

In evaluating the merits of Ms. Hipsley's claims, the *Cabaniss* Court adopted Dean William L. Prosser's right of privacy analysis, as published in 48 Calif.L.Rev. 383 (1960). After distinguishing commercial appropriation cases from the other three so called 'privacy torts,' the *Cabaniss* Court concluded: *"We think that, in*

addition to and independent of that right of privacy a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture…this right might be called a 'right of publicity.' Cabaniss at 381. (Quoting the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.)).

Similarly, in *McQueen v. Wilson*, 117 Ga. App. 488 (1968), *reversed on other grounds*, the Georgia Court of Appeals upheld the right of an actress, Butterfly McQueen, to recover for the unauthorized use of her photograph, announcing: *"…It has been recognized that the appropriation of another's identity, picture, papers,* *name or signature without consent and for financial gain might be a tort for which an action would lie..."* Id. at 491. Noting the similarities between the *McQueen* case and the *Cabaniss* case, Judge Deen, writing for the majority, stated:

> *"Both cases deal with a performer whose livelihood depends to some extent on the public image created by her efforts and talent, i.e., [In Cabaniss] an exotic dancer; [in McQueen], an actress in a well known movie. Both plaintiffs have packaged their personality within the area of performance as a commodity for sale to the public, and it can no more be tolerated that another take this commodity, that was developed and marketed by the plaintiff for private gain, than it be tolerated that her dress or automobile be misappropriated in like manner."*

Id. at 492.

Today, Georgia's leading case on the right of publicity is Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135 (1982) wherein the Eleventh Circuit sought clarification as to the existence and scope of the right of publicity in Georgia. Primarily, our Supreme Court determined: *"Georgia does recognize the right of publicity...it is the right to exclusive use of an individual's name, image and likeness."* Id. at 137. When such use is appropriated, without the owner's consent and for financial gain or benefit of the appropriator, regardless of whether the victim is a private citizen, an entertainer, or a public figure;

this is a tort for which the measure of damages is the value of the appropriation to the user. Id. 137-143.

Additionally, after recognizing that the right of publicity is assignable and transferable, in whole or in part, during the lifetime of its owner, the *MLK, Jr.* Court concluded the right of publicity is also survivable: *"We hold that the right of publicity survives the death of its owner and is inheritable and devisable."* Id. at 145. Moreover, the court held: *"...even where an owner chooses not to commercially exploit*[4] *his or her name or likeness during life, their right of publicity survives in death."* Id. at 148.

V. Argument

Accordingly, under current Georgia law, to establish a *prima facie* case for a violation to an owner's right of publicity, there must be: (1) the use of the owner's name, likeness, or image; (2) for the commercial use or benefit of the appropriator; (3) without the owner's consent.

[4] The *MLK, Jr.* Court defined the term 'exploitation' to mean: "...commercial use by the celebrity other than the activity which made him or her famous." *Id.* at 146.

A. Use of Ms. Benoit's Image

First, Plaintiff alleges Hustler Magazine used Ms. Benoit's image by publishing nude and partially nude photographs of Ms. Benoit in the March 2008 issue of Hustler Magazine. Photocopies of these photographs were filed under seal with the original Complaint, and copies were introduced into evidence at the hearing on Plaintiff's Motion for a Temporary Restraining Order. This matter is undisputed. (Hearing Transcript, p. 20). Accordingly, because Hustler Magazine *"used Ms. Benoit's image,"* the Court should find the first element of Plaintiff's *prima facie* case has been established.

B. For the Commercial Benefit of Defendants

Second, it is obvious that Hustler used Ms. Benoit's image for it's own commercial benefit. This element is the crux of this case. In its motion, Defendant raises two arguments: the newsworthy exception and the incidental use doctrine.

As to the newsworthy argument, Defendant claims: *"...in this case we do not have a commercial purpose...the photographs of Ms. Benoit were published for purposes of illustrating a news story of general public interest concerning the life and death of Nancy Benoit"* (Defendant's Brief, p. 13, ¶ 2). Defendant argues the use of Ms. Benoit's image was done in association with a 'news' article and since 'news' is protected by the First Amendment, it cannot constitute commercial appropriation. Maples v. National Enquirer, 763 F. Supp. 1137 (N.D. Ga. 1990); Waters v. Fleetwood, 212 Ga. 161 (1956).

However, even conceding that the subject matter of the article, namely the life and death of Ms. Benoit, is a legitimate matter of public interest and concern, Defendant fails to distinguish between *"...a publication which is generally entitled to first amendment protection and an item within such publication that constitutes commercial appropriation, and is thereby not entitled to first amendment protection."* United Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (1989).

In this case, the Court (and a jury) could easily find that the nude and partially nude photographs of Ms. Benoit, taken 20 years ago, are not newsworthy and do not constitute a legitimate matter of public interest or concern. Until her sensational murder, Ms. Benoit was 'newsworthy' because of her career as a model, professional woman wrestler and public figure. Further, at the time Hustler published the nude photographs, the tragic circumstances surrounding Ms. Benoit and her son's deaths were the matter of public interest and concern.

In conjunction with this argument, Defendant raises the incidental use doctrine, contending: *"...the mere fact that Hustler is engaged in the business of publication,* *out of which it seeks to make a profit, does not make the incidental publication a commercial use"* (Defendant's Brief, p. 14, ¶ 2).[5] However, Defendant misconstrues the term "incidental use".

In this case, the publication of the nude and partially nude photographs of Ms. Benoit was neither "incidental" nor "illustrative" of the article. The Court is invited to take judicial notice, and the evidence will show, that the essence of Hustler's "business" is publishing salacious, overtly nude and partially nude photographs of women. As such, it is ludicrous to characterize the publication of the Benoit photographs as merely incidental when virtually the sole purpose of the magazine consists of commercial exploitation of the publication of nude photographs of women. Moreover, obviously, Hustler would not and did not publish the "news" story about Ms. Benoit *without* the nude photographs. Instead, it could be argued, the textual article was, in fact, "incidental" to the publication of the nude photographs of Ms. Benoit, in as much as the "news" of her death was, at that point, over seven months old. Thus, the truth of the matter is, her death was not "news" at that point in time at all.

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[5] Citing *Almeida v. Amazon.com, Inc.*, 456 F. 3d. 1316 (11th Cir. 2006), in turn quoting Restatement (Second) of Torts §652C, comment (d) (1977).

Nevertheless, while the article's text may be afforded first amendment protection, the nude and partially nude photographs of Ms. Benoit are not newsworthy, are not merely incidental or illustrative of the article's subject matter, and are not entitled to first amendment protection. Accordingly, the Court should find Defendant has failed to carry its burden as to the both the first and second elements of Plaintiff's *prima facie* case.

C. Without Consent

Third, the evidence is undisputed that Hustler Magazine used Ms. Benoit's image without consent. Defendant alleges, but does not prove that *"Defendant Samansky conveyed the photographs to Hustler"* and "Defendant Samansky granted LFP rights in the photographs for publication in Hustler (Defendant's Brief, p. 6, ¶2; p. 10, ¶ 2). Defendant does not allege Ms. Benoit or her estate granted, assigned or transferred any rights to publish nude and partially nude photographs of Ms. Benoit, and there has been no evidence produced by the Defendant to show "consent" or legal assignment by Samansky or anyone else. Accordingly, the Court should find Defendant has failed to carry its burden as to the third and final element of Plaintiff's prima facie case.

VI. Conclusion

"The rationale for protecting the right of publicity is the straight-forward one of preventing [the Defendant's] unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[6]

In this case, Defendant has failed to satisfy its burden of showing, on the face of the pleadings, that Plaintiff is not entitled to any relief. Accordingly, Defendant's Motion to Dismiss should be DENIED.

Respectfully submitted this 15TH day of April, 2008.

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[6] Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135 (1982) (quoting from Kalven, *Privacy in Tort Law-Were Warren and Brandeis Wrong?*, 31 Law & Contemp.Prob. 326, 332 (1966).

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2008, I electronically filed the foregoing *Plaintiff's Response to Defendant LFP Publishing Group, LLC's Motion to Dismiss* with the Clerk of the court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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